In the Supreme Court

OF THE

United States

OCTOBER TERM, 1958

No.

WILLIAM EVANS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

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Subject Index

	Page
Reference to the opinions delivered in the courts below	2
Statement of the grounds upon which the jurisdiction of the Supreme Court is invoked	3
The question presented for review	4
Constitutional provisions and statutes which the case involves	5
Statement of the case	5
Argument	8
First Division.	
The presumption of innocence is founded upon the first principles of justice and is intended to prevent, so far as human agencies can, the conviction of an innocent person	10
The rule is even stronger where there has been a conviction upon circumstantial evidence and this is a circumstantial case	16
Second Division.	
The statement of facts contained in the opinion of the Court of Appeals is a true and correct condensation of the record on appeal as it affects the third count but both statement and record are devoid of any facts sufficient to prove this petitioner guilty or to overcome the presumption of innocence which surrounds him	21
Conclusion	28

Table of Authorities Cited

Cases	Pages
Carter v. United States, D.C. Cir. (1957), 252 F.2d 608	20
Coffin v. United States (1894), 156 U.S. 432	10, 11
Garrison v. United States, 5 Cir. (1947), 163 F.2d 874	20

	Pages
Maryland & Virginia Milk Producers Assn. v. United States, D.C. Cir. (1951), 193 F2d 907	20
McCarthy v. United States, 6 Cir. (1957), 25 F2d 298	24
Ong Way Jong v. United States, 9 Cir. (1957), 245 F2d 392	24
Rodriques v. United States, 5 Cir. (1956), 232 F2d 819	20
Sapir v. United States, 10 Cir. (1954), 216 F2d 722	20
United States v. Dolasco, 3 Cir. (1950), 184 F2d 746	20
United States v. Gasmiser Corporation (1948), 7 F.R.D. 712	17
United States v. Lo Biondo, 2 Cir. (1943), 135 F2d 130	24

Codes

18 U.S.C., Section 3231	5
26 U.S.C.:	
Section 4741(a)	5
Section 4744(a)	5
Section 7237	5
28 U.S.C., Section 1254(1)	4, 5

Constitutions

Constitution of the United States:	
Fifth Amendment	5
Sixth Amendment	5

Texts

Corpus Juris Secundum, Criminal Law, Volume 22, Section 581, page 893	14
Greenleaf on Evidence, 14th Ed., 1883, Volume 3, Part 5, Section 29, note 3(a)	9, 10
Lawson, Presumptive Evidence, page 433, note	11
McNally's Rules of Evidence, 1802, Chapter 17	9
Wharton's Criminal Evidence, 12th Ed. (1955), Volume I, Section 93, page 183	3, 14

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To the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

William Evans respectfully petitions for a writ of certiorari to review that portion of a judgment of the United States Court of Appeals for the Ninth Circuit which affirmed the judgment of conviction of peti-

tioner by the United States District Court for the Northern District of California, Southern Division, upon the third count of an indictment[1] charging petitioner with narcotic violation,[2] and the imposition upon petitioner of a sentence of ten years' imprisonment and $1,000.00 fine.[3]

REFERENCE TO THE OPINIONS DELIVERED IN THE COURTS BELOW.

No written opinion was filed in the District Court (where the action was numbered Crim. 35,551). The judgment entered therein against the petitioner is set forth at pages 6 to 9 of the record as printed for the use of the Court below, of which nine copies have been duly filed herein.

The written opinion filed in the Court of Appeals is not yet reported officially, and has been printed only as a slip opinion for use in that Court. The appeal

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[1]The indictment was in four counts. Petitioner's co-defendant, Josephine Evans, was convicted upon three counts. Petitioner was convicted upon those same three counts, but his conviction on each of them was reversed by the Court of Appeals. Josephine was not a co-defendant upon the third count and makes no application to this Court. This petition is by defendant William Evans, only, and is directed solely to the judgment which affirmed his conviction upon the third count by the District Court.

[2]The possession of 22 grains of marihuana without having paid the transfer tax imposed by law.

[3]The printed transcript of the record before the Court of Appeals discloses at page 8 thereof the filing of two informations on identity against petitioner whereby he was charged with—and duly admitted—two prior convictions had upon charges arising out of narcotic violations. The crime dates were identical in both informations.

there was numbered 15,602. A copy of this opinion is annexed hereto as Appendix A.

A timely petition for rehearing was filed in the Circuit Court on June 25, 1958, which petition was denied on August 4, 1958, without written opinion.

STATEMENT OF THE GROUNDS UPON WHICH THE JURISDICTION OF THE SUPREME COURT IS INVOKED.

The jurisdiction of the Supreme Court is invoked upon the ground that a person accused of a crime is presumed to be innocent until the contrary is proved, and that this presumption remains with him throughout the trial until it is overcome by proof of guilt beyond a reasonable doubt in a fair and impartial trial,[1] and that the Honorable Court of Appeals, *as disclosed by the very text of its opinion,* wholly disregarded and ignored such presumption; and thereby so far departed from the accepted and usual course of judicial proceedings, and so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

Petitioner will establish such a high degree of sanctity for the "presumption of innocence" that he believes this Court cannot reject the opportunity to correct the error and the wrong done to him by the Court of Appeals when it nullified that ancient, yet modern, presumption, and refused to set aside the conviction of petitioner upon the third count.

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[1] Wharton's Criminal Evidence, 12th Ed. (1955) Vol. I, Sec. 93, p. 183.

The judgment of the Court of Appeals sought to be reviewed bears date the 28th day of May, 1958, and was entered upon the same date. A copy of this judgment is annexed hereto as Appendix B.

Petition for rehearing was timely filed but was denied upon August 4, 1958, without written opinion. No extension of time has been sought or granted within which to file this petition for certiorari.

The statutory provision believed to confer on this Court jurisdiction to review said judgment by writ of certiorari is 28 U.S.C. 1254(1).

THE QUESTION PRESENTED FOR REVIEW.

The sole question presented for review is whether or not this Court will take cognizance of and grant relief from the failure, refusal and neglect of a Court of Appeal which discloses *by its own statement of facts contained in its opinion* that it has wholly disregarded and ignored the sacred and centuries-old right of the presumption of innocence when charged with crime.

In other words, can the Court of Appeals *nullify* the right to the benefit of the presumption of innocence—and affirm the conviction by a District Court upon evidence which *entirely fails to overcome such presumption?*

CONSTITUTIONAL PROVISIONS AND STATUTES WHICH THE CASE INVOLVES.

Title 28 U.S.C., sec. 1254(1).

Title 18 U.S.C., sec. 3231.

Fifth Amendment to the Constitution of the United States.

Sixth Amendment to the Constitution of the United States.

Title 26 U.S.C., sec. 4741(a).

Title 26 U.S.C., sec. 4744(a).

Title 26 U.S.C., sec. 7237.

The text of each of the foregoing, insofar as herein applicable, will be found verbatim in Appendix C, hereto attached.

STATEMENT OF THE CASE.

The basis for federal jurisdiction in this case in the United States District Court—the court of first instance—will be found in the Sixth Amendment to the Constitution of the United States, and in Title 18, U.S.C.A., Sec. 3231. The text of both of these will be found in Appendix C annexed hereto.

Petitioner and a co-defendant, Josephine Evans, were charged together with four counts of narcotic violations by an indictment returned March 13, 1957, by the Grand Jury of the Northern District of California. Count 1 charged concealment and transportation; count 2 charged sale; count 3 [the one here under consideration] charged concealment and transporta-

tion of 22 grains of marihuana, "acquired, obtained and possessed without first having paid the transfer tax, etc."; and count 4 charged conspiracy for the sale of heroin.[2] Josephine Evans was convicted and sentenced upon Counts 1, 2, and 4. Her conviction upon count 4 (conspiracy) was reversed on appeal but her conviction upon counts 1 and 2 was affirmed. She is not a petitioner here.

Petitioner was convicted upon all four counts, and sentences aggregating fifty years, with total fines of $11,000, were imposed upon him. The Court of Appeals reversed all of his convictions except that upon Count 3, the marihuana count, which is before this Court in the instant proceeding. It and the facts surrounding it are entirely separate and different from the transactions referred to in counts 1, 2, and 4.

The evidence shows that narcotic agents had petitioner under surveillance for several days and that five of them entered a flat at 953 Broderick Street in San Francisco, at 4:00 A.M. on March 5, 1957, to (and did) arrest petitioner. They had no search warrant. They had an arrest warrant based *only* upon previous charges not involving marihuana or 953 Broderick Street. (Tr., p. 130.) The arrest was solely on charges prior to the 4:00 A.M. entry here—charges which were later made the subject of the first, second and fourth counts of the indictment here. Petitioner's conviction upon each of those counts was reversed by

[2] An exact copy of the indictment will be found at pages 3 to 6 of the Transcript of Record printed for use in the Court of Appeals.

the Court of Appeals. After making the arrest the five agents made a very careful and thorough search of the entire flat. (Tr., pp. 216-217.) Only two of the agents were called as witnesses. They testified to the finding of 22 grains (admitted to be a non-commercial quantity) of marihuana inserted under the carpet on the top stair "riser" leading into the flat. (Tr., p. 30, p. 175.)

At the time of the arrest the flat was occupied by Mildred Evans[3a] and her two children, who admittedly lived there. It was the home of Mildred Evans—she was the named tenant and gas and electric service were issued in her name. (Tr., p. 195.) Petitioner had been there five minutes and had just disrobed in the bathroom when the agents entered. Mildred testified that she knew petitioner, had known him in Chicago, that he was the father of one of her children, that he had never lived at 953 Broderick but had visited her once or twice a week. Both she and petitioner testified that he maintained no toilet articles, clothing or other personal belongings at that address. This testimony (Tr., pp. 189, 196) was confirmed by the result of the search made by the agents. (Pages 216-217.) It was questioned by no one.

The agent who found the marihuana packet testified that he showed it to petitioner and that petitioner asked him "Is it mine?" and "Where did you find it?" and also asked the agent if his answer would make any difference respecting a conviction, and that

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[3a]Not the same person as Josephine Evans, nor related to her.

when told "it might" petitioner said "Well, I will try to figure out what you have against me first before I answer that." (Tr., pp. 135-136.) Petitioner denied having made these statements. (Tr., p. 201.) He also testified that he did not know the marihuana was there, had not put it there, and had never seen it before. (Tr., pp. 183-184.)

Petitioner makes no more detailed statement of facts at this point for the reason that his petition to this Court is based upon the plea that the evidence respecting the marihuana offense which was marshalled by the Court of Appeals in its opinion is wholly insufficient to overcome the presumption of innocence with which petitioner was clothed at the outset of the trial in this case—a protective mantle which—despite his conviction on the third count—was nevertheless there to protect him. The facts here stated have been merely for the purpose of apprising this Court of the nature of the case. However, the abbreviated statement here given is, petitioner believes, accurate and correct, and has been carefully keyed to the printed transcript of the record printed for the Court of Appeals and now on file in this Court.

ARGUMENT.

Petitioner presents his argument hereunder in two divisions. In his first division he will seek to establish to this court and to its members the *pinnacle of importance* in our jurisprudence and the administra-

tion of our criminal statutes which is occupied by that age-old doctrine commonly known as "the presumption of innocence".[6]

In his second division petitioner will present an analysis of the evidence upon which he was convicted in the District Court.[7] This analysis of the evidence upon the third count will be based *not* upon petitioner's recital or interpretation thereof, *but upon the recital and interpretation thereof given by the Court of Appeals* in support of its judgment affirming the conviction of petitioner as to that third count.

Thus, petitioner's entire position is based upon the firm and well substantiated contention that the Court of Appeals *nullified* the doctrine of the presumption of innocence—a nullification which petitioner believes this Court has both the power and the duty to correct. And *not only* to prevent the gravest injustice to petitioner (ten years imprisonment upon evidence which *in no wise outweighed the presumption of innocence)*

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[6]The term "age-old" is intentionally employed. Not only has the doctrine been a part of the English common law since 1802 (McNally's Rules of Evidence, 1802, Chapter 17), but it has been a most important provision of the law of many different civilizations since long centuries before the birth of Christ (Greenleaf on Evidence, 14th Ed., 1883, Vol. 3, Part 5, sec. 29, note 3(a)). The origin and historical development of this doctrine—one that Anglo-Saxons are prone to think originated with them—will be further discussed in the text of this petition.

[7]By the Hon. George B. Harris, sitting without a jury. Judge Harris also denied a motion for an acquittal made at the conclusion of the government's case (Tr. p. 175). A second formal motion for acquittal and motion for a new trial, made upon notice after completion of the taking of evidence and after Judge Harris had found both defendants guilty on all charges set forth in the indictment, was also denied (Tr. p. 21).

but to serve to prevent the imposition of similar injustices to others charged with crime in the future.

FIRST DIVISION.

THE PRESUMPTION OF INNOCENCE IS FOUNDED UPON THE FIRST PRINCIPLES OF JUSTICE AND IS INTENDED TO PREVENT, SO FAR AS HUMAN AGENCIES CAN, THE CONVICTION OF AN INNOCENT PERSON.[8]

The legal position here taken by petitioner—and the sole point relied upon by him in seeking writ of certiorari herein—is one of the oldest, one of the truest, one of the most highly regarded, and one of the most needed and essential of legal doctrines. It is a concept which truly embodies *mercy* with *justice*—and in such form as has heretofore been imperative with this Honorable Court, as well as hosts of other courts, other peoples, other countries—indeed, other civilizations. It is to *preserve* that concept, as well as to have its principles applied to the instant case, that petitioner here presents his petition. All this has been heretofore expressed in most noble form by a great and eloquent man—Rufus H. Choate. Petitioner deems it most appropriate, at the outset of his argument, and would here adopt it:

> "The presumption of innocence is not a mere phrase without meaning; it is in the nature of evidence for the defendant; it is as irresistible as

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[8] And not only in our federal courts—but in the courts of all English speaking countries—with the doctrine running back through the centuries to the Roman Empire—to Sparta—to Athens—and as far back as the Pentateuch (*Coffin v. United States*, 1894, 156 U.S. 432, 454, 455; Greenleaf on Evidence, 14th Ed., 1883, Vol. 3, Part 5, Sec. 29, Note 3(a)).

> the heavens till overcome; it hovers over the prisoner as a guardian angel throughout the trial; it goes with every part and parcel of the evidence."[9]

That this doctrine is of great antiquity—is widespread—and has developed independently in many ages and many legal jurisdictions has been abundantly established by authority of rank as high as petitioner is able to muster before this Court, i.e., the Supreme Court of the United States. This was in a most scholarly opinion written in 1895 by Mr. Justice Edward Douglass White, and concurred in by the full court as it then stood. The case is that of *Coffin v. United States*, 156 U.S. 432. It involved the conviction of the appellant upon an indictment charging misappropriation of the funds of a national bank. It does not seem essential to outline the nature of the case—as it is relied upon mainly for its profound and learned exposition of the law upon "presumption of innocence", bearing, as it does, the hallmark of approval by this honorable court.[10] So complete is the presentation—so logical and buttressed by authorities the conclusions there drawn—that petitioner feels he

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[9]Lawson: Presumptive Evidence, p. 433, note.

[10]This unanimous opinion of the Supreme Court has been criticized—and by personages no less than Thayer and Wigmore—but *not* for its historical treatment of the doctrine of presumption of innocence—not for its assertion that the law is—and for centuries has been—that one accused of crime is entitled to the protection of that presumption. Only upon the contention that the court was wrong when it said that the presumption of innocence (p. 459) "is an instrument of proof created by the law in favor of one accused". However, this Honorable Court has not yet so stated; and as petitioner reads the less than half-dozen

cannot do better than to here adopt portions of [illegible] opinion as a part of his argument. There are many pages which deal with this topic alone (pp. 453 to 461), but petitioner will refer to a portion only, commencing upon page 453, and repeats that he adopts the language of the opinion both as authority and as argument for the writ herein sought.

> "The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law. It is stated as unquestioned in the text-books, and has been referred to as a matter of course in the decisions of this court and in the courts of the several States (Citing Taylor, Wills, Best, Greenleaf, Wharton, Phillips, and other authors, as well as many cases.) Greenleaf traces this presumption to Deuteronomy, and quotes *Mascardus De Probationibus* to show that it was substantially embodied in the laws of Sparta and Athens. * * * There can be no question that the Roman law was pervaded with the results of this maxim of criminal administration, as the following extracts show [quoting at length]:
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> (p. 458) This confusion makes it necessary to consider the distinction between the presumption of innocence and reasonable doubt as if it were the original question. In order to determine whether the two are the equivalents of each other,

Supreme Court cases which have discussed the point, the [illegible] laid down in the *Coffin* case has not been repudiated [illegible] does the editor of Rose's Notes so state. Nor, in [illegible] Mr. Wigmore. This is also the rule in a very large number of state jurisdictions.

must first ascertain, with accuracy, in what each consists. Now the presumption of innocence is a conclusion drawn by the law in favor of the citizen, by virtue whereof, when brought to trial upon a criminal charge, he must be acquitted, unless he is proven to be guilty. *In other words, this presumption is an instrument of proof created by the law in favor of one accused, whereby his innocence is established until sufficient evidence is introduced to overcome the proof which the law has created.* This presumption on the one hand, supplemented by any other evidence he may adduce, and the evidence against him on the other, constitute the elements from which the legal conclusion of his guilt or innocence is to be drawn. (Emphasis added.)

Greenleaf thus states the doctrine: "As men do not generally violate the penal code, the law presumes every man innocent; but some men do transgress it, and therefore evidence is received to repel this presumption. This legal presumption of innocence is to be regarded by the jury, in every case, *as matter of evidence; to the benefit of which the party is entitled.* (Emphasis by the court.)

* * * * * * * * *

(p. 460) The fact that the presumption of innocence is recognized as a presumption of law and is characterized as a *presumptio juris*, demonstrates that it is evidence in favor of the accused. For in all systems of law legal presumptions are treated as evidence giving rise to resulting proof to the full extent of their legal efficacy."

[Follows a discussion of the presumption as compared with "reasonable doubt."]

Petitioner has drawn thus at length because of the detail, the clarity, the soundness and the source of the text he has just adopted.

Next, he would direct the Court's attention to the 12th edition of Wharton's Criminal Evidence, published in 1955, where that renowned work has this to say respecting the presumption of innocence (Vol. 1, sec. 93, p. 183):

> "Under the common law, and by virtue of statutes declaratory of the same rule, a person accused of crime is presumed to be innocent until the contrary is proved, and this presumption remains with him throughout the trial until it is overcome by proof of guilt beyond a reasonable doubt in a fair and impartial trial. *This is true irrespective of whether the cause is tried with or without a jury.*[11] The presumption of innocence is founded upon the first principles of justice and is not a mere form, but a substantial part of the law. (Emphasis added.)
>
> (p. 190) The presumption of innocence is a conclusion of law in favor of the accused, by which his innocence is not only established, but continues until sufficient evidence is introduced to overcome the proof which the law has created namely, his innocence."

The editors of Corpus Juris Secundum, Criminal Law, Vol. 22, sec. 581, say at page 893:

> "One who is accused is presumed to be innocent of the crime charged against him. The presump-

[11]The trial here was before Honorable George B. Harris sitting without a jury.

tion of innocence exists in every criminal case and extends to every person and corporation accused of any crime, and it applies to every element of the crime charged.

The presumption of innocence may only be overcome by means of a fair and impartial trial, and it exists notwithstanding a failure by accused to testify, or to make a statement denying his guilt, or to offer evidence of his good character, or any evidence.

The presumption of innocence is a conclusion drawn by the law in favor of accused, by virtue whereof, when brought to trial on a criminal charge, he must be acquitted, unless he is proved to be guilty, and the prosecution is required to introduce evidence establishing the guilt of accused beyond a reasonable doubt. It is an artificial, refragable presumption both of fact and of law, which may not be ignored. It is founded on the first principles of justice, and is intended, not to protect the guilty, but to prevent, so far as human agencies can, the conviction of an innocent person."

Petitioner could continue at great length, and cite to this Court precedent upon precedent—text upon text—but believes that for the purposes of this application for the issuance of the writ the foregoing should be sufficient. He now offers to—and will, if such desire be indicated—explore the origin, trace the history, and set forth all of the precedents of the various courts of this country, both federal and state, establishing or tending to establish that the doctrine of the presumption of innocence with which any accused person

enters upon a trial (and that includes this petitioner) *cannot* be overcome except by evidence establishing his guilt. This, whether we consider the weight of the evidence, or the theory of reasonable doubt, or the rule of burden of proof. It is simply the law that no court may take away a man's liberty without giving him the benefit—so far as it may go—of the doctrine of reasonable doubt.

In the instant case your petitioner was not given the benefit of the presumption of innocence—and the recital by the Court of Appeals of the evidence in the record upon which its affirmation is based wholly fails to support or to sustain such affirmation.

This will be amply demonstrated in the second division of this point.

THE RULE IS EVEN STRONGER WHERE THERE HAS BEEN A CONVICTION UPON CIRCUMSTANTIAL EVIDENCE—AND THIS IS A CIRCUMSTANTIAL CASE.

Both the brief statement of the facts petitioner has given above under his Statement of the Case and the much more elaborate review of the facts contained in the opinion in the instant case (Apdx. A) demonstrate beyond cavil that the conviction of petitioner was had upon *circumstantial evidence*. This is so apparent that he feels he need not lengthen his petition by demonstration. And we find—not only in the federal courts, but in the state courts—that strong as is the rule here relied upon in *any* criminal case, it is even stronger where the conviction was had upon circumstantial evidence.

While this appears to have been the rule in the lower federal courts at all times petitioner has not been able to find that this Court has had occasion to express itself upon the precise subject under discussion here. Petitioner feels that he may be most helpful to this Court by quoting briefly from the opinion in *United States v. Gasmiser Corporation* (1948), 7 F.R.D. 712, where the carefully compiled and written opinion of Judge Rodney, of the District Court of Delaware, reviews the rule—cites many Court of Appeal opinions to the same effect—and states that this Court had not at that date (nor has petitioner been able to find that it has since then) appeared to have had the exact question involved before it. (p. 719.) Petitioner believes that Judge Rodney's opinion (both originally and upon rehearing) truly and clearly states the rule, and petitioner adopts a portion of that opinion as his own argument to this Court in support of his contention that there is a "circumstantial evidence rule" and that the instant case is appropriate for the application of that doctrine. This case involved a stock fraud and after verdicts of guilty by the jury the motions of defendants for acquittal were granted. The government filed a petition for rehearing, which was denied, but in the course of its consideration the learned judge reviewed the entire subject, with authorities, with such certainty and clarity that *petitioner now adopts portions of the opinion as his argument herein upon the point of the circumstantial evidence rule:*

(p. 714) "The case involved much testimony of a circumstantial nature. The rule adopted by the

Circuit Court of Appeals of this (Third) circuit is 'To justify conviction of crime where the evidence relied upon is circumstantial in nature the evidence must be such as to preclude every reasonable hypothesis but that of guilt,' 131 F2d 1003, or, as otherwise expressed, 'Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial court to instruct the jury to return a verdict for the accused.' 73 F2d 563."

(p. 717) "No direct evidence of the existence of a scheme to defraud has been offered. Naturally the very nature of the subject ordinarily precludes such evidence. Secrecy usually attends such crimes, and guilt must be inferred from various acts and circumstances of which direct evidence is offered. That there may be direct evidence of circumstances from which guilt may be inferred does not, however, change the nature of the case from that of one based upon circumstantial evidence.

While the circumstances may be proven by direct evidence, yet when those circumstances are solely relied upon as the basis of conviction the direct proof of the circumstances does not change the result that the ultimate fact, the intent to defraud, has been proven by circumstantial evidence.

This then being a criminal case based upon circumstantial evidence [as is the instant Evans case], in order for the motions of defendants to be denied guilt must be the only reasonable hypothesis from such evidence. If there is any other reasonable hypothesis, although admittedly guilt may

also be a reasonable hypothesis, then the defendants are entitled to judgments of acquittal. In this circuit it is clear that 'In order to justify a conviction of crime on circumstantial evidence it is necessary that the directly proven circumstances be such as to exclude every reasonable hypothesis but that of guilt.' United States v. Laffman, 3 Cir., 1945, 152 F2d 393, 394; United States v. Tatcher, 3 Cir., 131 F2d 1002, 1003; United States v. Russo, 3 Cir., 1941, 123 F2d 420, 423, or, as it has been otherwise stated by many courts in this circuit, 'Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial court to instruct the jury to return a verdict for the accused.' Paul v. United States, 3 Cir., 1935, 79 F2d 561, 563; Nicola v. United States, 3 Cir., 1934, 72 F2d 780, 786; Grant v. United States, 3 Cir., 1931, 49 F2d 118, 119; Graceffo v. United States, 3 Cir., 1931, 46 F2d 852, 853; Ridenour v. United States, 3 Cir., 1926, 14 F2d 888, 892; Yusem v. United States, 3 Cir., 1925, 8 F2d 6, 8; Wiener v. United States, 3 Cir., 1922, 282 F. 799, 801. The presumption of innocence with which an accused stands before the bar of justice is not overcome by circumstantial evidence which offers a reasonable hypothesis other than guilt. Wright v. United States, 8 Cir., 1915, 227 F. 855, 857; Union Pacific Coal Co. v. United States, 8 Cir., 1909, 173 F. 737, 740."

(p. 719; on petition for rehearing) "This court's decision was based upon a widely recognized rule which has long prevailed in the Third Circuit. Such rule, which is designated as the 'circumstantial evidence rule,' has usually been stated in

one of two ways: Either that (1) 'To justify conviction of crime where the evidence relied upon is circumstantial in nature, the evidence must be such as to exclude every reasonable hypothesis but that of guilt,' or (2) 'Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial court to instruct the jury to return a verdict for the accused.' Recognizing the applicability of this rule to the instant case, it was determined that there was a reasonable hypothesis other than guilt and that the defendants' motions for judgment of acquittal should have been granted."

Petitioner has "borrowed" the language of this Third Circuit judge by reason of its lucidity and its close application to the situation presented by the instant case. There are innumerable authorities to the same effect, e.g.:

United States v. Dolasco, 3 Cir. (1950), 184 F2d 746, 748.

Sapir v. United States, 10 Cir. (1954), 216 F2d 722, 724.

Maryland & Virginia Milk Producers Assn. v. United States, D.C. Cir. (1951), 193 F2d 907, 917.

Carter v. United States, D.C. Cir. (1957), 252 F2d 608, 612.

Garrison v. United States, 5 Cir. (1947), 163 F2d 874.

Rodriques v. United States, 5 Cir. (1956), 232 F2d 819.

SECOND DIVISION.

THE STATEMENT OF FACTS CONTAINED IN THE OPINION OF THE COURT OF APPEALS IS A TRUE AND CORRECT CONDENSATION OF THE RECORD ON APPEAL AS IT AFFECTS THE THIRD COUNT BUT BOTH STATEMENT AND RECORD ARE DEVOID OF ANY FACTS SUFFICIENT TO PROVE THIS PETITIONER GUILTY OR TO OVERCOME THE PRESUMPTION OF INNOCENCE WHICH SURROUNDS HIM.

The entire discussion of the third count by the Court of Appeals commences upon page xii of Appendix A, with the words "William alone was convicted on count 3." Petitioner will here demonstrate, statement by statement, how utterly the facts therein set forth fail to establish his guilt—fail to overcome the presumption of innocence in his favor—fail to sustain the Court of Appeals in its affirmation of the judgment of conviction upon the third count.

(All pagination is from the opinion as printed in Appendix A attached hereto)

(Page xii)

The arrest on March 5, 1957, at 4:10 to 4:20 A.M., at 953 Broderick Street, pursuant to warrant of arrest for narcotics violation: "A search of the premises was made incident to the arrest." The finding of twenty-two grains of marihuana "concealed under the carpet on the top step of the stairs inside the dwelling." The marihuana was "contained in a coin wrapper or envelope of the same type used to contain the heroin."[12]

[12] This coincidental fact could have *exactly* no weight or bearing in this case. Petitioner's conviction upon the heroin counts (sales, transportation, conspiracy) was set aside by the same Court of Appeals.

Petitioner had "reached the apartment only five minutes prior to his arrest, and when the officers arrived, was attired only in his underwear."

"The apartment was also occupied by a woman who then identified herself as Mildred Evans."[13]

"At that time, she stated that she was married to William [Evans], that they lived together, and had their children living there."[14]

(Page xiii)

"At the trial, however, she testified that her real name was Mildred Moore—that she had never used the name Mildred Evans—that an automobile was purchased in that name—that William did not live with her and the children—one of whom was his—but that he visited her once or twice a week."[15]

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[13] "Also occupied". There was no testimony—from *anyone*—that petitioner "occupied" that property. Funk & Wagnalls' New Standard Dictionary: "occupy": To use or employ in an exclusive manner; to take and hold possession of; have in possession and use." In its choice and use of the word "occupied" in the opinion here the Court of Appeals showed complete disregard of the presumption of innocence. Surely there was neither reason nor point in making that statement *unless* it was one of the asserted "facts" which influenced its opinion. And it was *not* a fact.

[14] Here again the Court of Appeals nullified the presumption of innocence. These statements by Mildred (even if actually made) are no part of the evidence in this case, and *at the most* could only serve to impeach the veracity of her sworn testimony. She was not a party to the indictment. As petitioner said in his Petition for Rehearing, "*in no possible legal guise could such statements constitute evidence against appellant.*" Yet obviously the affirmation was based upon that concept *as a proven fact!*

[15] Of what possible evidentiary value is this testimony in establishing the guilt of petitioner? Furthermore, petitioner respectfully suggests that *the very fact* that the Court of Appeals referred to the alleged statements of Mildred Evans—out of the

"William [Evans] testified that he had spent only three or four nights at 953 Broderick street since January 10, 1957."[16]

"Mildred paid the rent on the Broderick street premises, and was the named customer for gas and electric service."[17]

"Both William and Mildred testified that he maintained no clothing, toilet articles, or other personal belongings at that address. This was not denied by the federal agents who thoroughly searched the premises."[18]

"Mildred denied ownership of the marihuana. When questioned about the marihuana William asked if the answer would make any difference in obtaining a conviction. Upon being told that it might, he said, 'Well, I will try to figure out what you have against me first before I answer that.' Later, when told that Mildred was to be booked for joint possession of the marihuana, he said, 'Well, you don't want to book her

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courtroom—not under oath—and *the very fact* that it used the prefatory words "At the trial, however, . . ." clearly establishes that the court *relied upon those matters* in arriving at its decision to affirm the judgment of conviction. Petitioner asserts that this is sublime disregard for the presumption of innocence which attended him at every stage of the trial.

[16]This covered a period of 53 days; there is no support here for "possession" of the premises (and so, of the marihuana) by this petitioner.

[17]This merely confirms petitioner's insistence that he was convicted unfairly and without consideration of the presumption of innocence with which he was clothed.

[18]Surely there is support here only for petitioner's contention.

for that."[19] At the trial William testified that he did not know the marihuana was there—had not put it there—had never seen it before."[20]

(Page xiv)

Next the opinion recites that proof of exclusive control and dominion over property "is a potent circumstance tending to prove knowledge of the presence of such narcotics, and control thereof." There follows the frank statement contained in the opinion that "he was *not* in exclusive possession of the premises" and that hence possession may not be inferred "unless there are other incriminating statements or circumstances tending to buttress such an inference." (Emphasis added.)

(Page xv)

The opinion states that the evidence "warrants the inference that William lived at 953 Broderick Street part of the time, OR was a frequent overnight visitor". (Emphasis added.)[21]

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[19]These were only statements *claimed* to have been made by petitioner at the time of his arrest; at a time when he was under no obligation to speak (*United States v. Lo Biondo*, 2 Cir., 1943, 135 F2d 130; *McCarthy v. United States*, 6 Cir., 1957, 25 F2d 298; *Ong Way Jong v. United States*, 9 Cir., 1957, 245 F2d 392).

[20]At this point the opinion interpolates that petitioner here "argues that the above-summarized evidence does not support his conviction under count 3, because it provides no proof . . . of . . . possession." The opinion further recites the provisions of the law respecting "presumptive evidence of guilt" supporting the statement by the court: ". . . the Government . . . was therefore required to prove that William had the . . . marihuana in his possession."

[21]This statement is in the *alternative*—it is not a finding. If it were a finding it could only be supported by the same disregard for the presumption of innocence which had actuated that Court throughout its consideration. The evidence quite obviously does *not* at all support *either* alternative.

Neither the statement that petitioner was "present on the occasion when the narcotics were seized" or that he arrived in time "to enable him to hide the narcotics" constitute evidence upon which to base his conviction. It was the burden of the prosecution to prove possession. Certainly it was not proven—and only by the disregard of the presumption could the conviction have been affirmed.[22]

The opinion continues: "In our view there are such additional incriminating statements and circumstances in this case. The evidence warrants a finding that Mildred was the only other adult who was present when the officers entered, *and the only other adult who had access to the interior of the residence.*"[23]

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[22]Petitioner reviews this portion of the Court of Appeals opinion to establish that, indeed, the "presumption of innocence" to which he was entitled, and as has been so strongly set forth in the First Division of this argument, has been denied to him.

[23]The italicized language establishes *beyond the peradventure of a doubt* that the Court of Appeals *nullified*—that is just the word to use, "disregarded" is not sufficiently strong—the presumption of innocence. How can it be said that when the entire evidence adduced in a case shows *nothing*—absolutely *nothing*—to establish that other persons (*numerous* other persons) may not have had access to a residence, it is not nullification of the presumption of innocence to affirm a judgment of conviction on the basis that defendant there was guilty because he was "the only other adult who had access!" Is there not, as we have seen above, the rule that in "circumstantial evidence cases" the evidence must be such as to *exclude every other hypothesis but that of guilt?* As petitioner said in his petition for rehearing, at page 5:

> "There is neither *showing nor intimation* that appellant *ever* resided at the Broderick Street address—or that he could have resided there. On the contrary, he was there so seldom in that period that any number of others might have occupied those premises with Mildred—perhaps a series of men, mere-

The opinion states:[22] "She denied knowledge of the presence of the narcotics or ownership of them."[24]

The opinion continues "William, when questioned after arrest, did not remain silent as he had the right to do, but made a statement (quoted above) tending to substantiate Mildred's disclaimer."[25]

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triciously or otherwise—perhaps relatives—perhaps women friends—perhaps the father of the other child. Perhaps a tenant—perhaps a 'baby sitter' while Mildred was engaged elsewhere in shopping—or visiting—or gainful employment. *There was not one word of interrogation—not one word of proof—as to such occupancy or non-occupancy. And the burden was not upon appellant.* . . . The agents arrived in about five minutes—they had not had the place under surveillance earlier that night. Mildred was not asked respecting any earlier callers. Any one of such earlier callers might have left the small quantity of marihuana concealed under the top stair carpet. Mildred could well have a marihuana smoking friend who called often and who kept his or her 'weed' cached for ready use in what was thought to be a safe place."

How, under these conditions of the proofs, petitioner most respectfully asks this Court, could his conviction upon the third count *possibly* have been sustained? Only by the nullification of the presumption of innocence set up so many centuries ago in his favor.

[24]How does such a denial even remotely bear upon the guilt or innocence of your petitioner? Except upon the theory that only one or other of those two persons could have been the guilty party. Such a theory—as we have just seen—could only result from the complete disregard of petitioner's presumption of innocence (and *did* so result—from just such disregard).

[25]Petitioner (as appears from the First Division of the petition—and as the Court of Appeals correctly stated—was under no obligation to speak or to answer questions put to him by the narcotic agents. Hence any failure to deny knowledge or possession of the marihuana could not be legally charged against him *in any manner*. As to "tending to substantiate", petitioner respectfully propounds to this Court the queries (1) why did the opinion use the "weasel word" "tending"? Can a man receive a ten year federal penitentiary sentence upon the strength of evidence as to which the august Court of Appeals tribunal can only use the term "tending"?

The opinion continues: "The factfinder was entitled to accept her disclaimer, the result of which is to leave William as the only other person who could have placed the narcotics where they were found."[26]

Petitioner could scarcely deny the legal effect of his prior convictions—nor did he, nor does he—so attempt. However, he most respectfully asserts that (aside from its effect upon the severity of the sentence to be imposed) the only possible effect would be upon the credibility of petitioner as a witness. The trial court, and, in turn, the Court of Appeals, could disbelieve and disregard every syllable uttered by petitioner at the trial—and *still*—the presumption of innocence would not be overcome. *Still*, every statement hereinabove made respecting the disregard and nullification of the doctrine of the presumption of innocence would be true and would be effective.

One final word with respect to the opinion. The court says (p. xvi)—and these words are fraught with the gravest significance—:

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[26]Not so! Petitioner has herein abundantly shown that the record *does not* justify either inference or holding that Mildred Evans and petitioner were the only ones who "could have placed the narcotics where they were found". Only by complete and sublime disregard of the presumption of innocence could any such finding of fact be made from the evidence adduced at this trial and without such a finding your petitioner could neither have been found guilty by the trial court nor had his conviction affirmed by the Court of Appeals. It is to this august Court that petitioner directs his prayer that the doctrine of the presumption of innocence to one charged with crime be preserved as to petitioner and to all others who may follow in his wake for centuries yet to unfold.

Finally, and petitioner nears the end of his analysis of this (to him, at least) shocking portion of the opinion (p. xvi), he reads:

> **"In view of these circumstances, and in the light of all the testimony summarized above, we are of the opinion that the evidence is adequate to support the conviction of William on count 3 of the indictment."**

Petitioner most respectfully submits that the quoted statement is not—and cannot—be true. This, for all of the reasons meticulously hereinabove set forth.

CONCLUSION.

Petitioner most respectfully submits that it has been abundantly established hereinabove that the Court of Appeals *by its own statement of the facts* has actually nullified the sacrosanct presumption of innocence which has surrounded a defendant for ages past—has wholly ignored the doctrine of "any other reasonable hypothesis"—and, as well, likewise ignored the fact that the conviction of petitioner was based upon circumstantial evidence. That by reason of these matters and for all of the reasons hereinabove set forth, the writ should issue herein.

Wherefore, your petitioner prays that a writ of certiorari issue under the seal of this Court, to the end that this cause may be reviewed and determined by this Court as provided for by law; that the judgment of said Court of Appeals be reversed; and for

"He denied knowledge of the presence of the narcotics or ownership of them. The factfinder, however, was not required to believe him, especially in view of his previous narcotics convictions."

such other and further relief as to this Court may seem proper.

Dated, August 28, 1958.

ARTHUR D. KLANG,
Attorney for Petitioner.

(Appendices A, B and C Follow.)

Appendix A

United States Court of Appeals for the Ninth Circuit

WILLIAM EVANS and JOSEPHINE EVANS, *Appellants*, vs. UNITED STATES OF AMERICA, *Appellee*.	No. 15,602 May 28, 1958

Upon Appeal from the United States District Court for the Northern District of California Southern Division

Before: Lemmon, Barnes, and Hamley, Circuit Judges

HAMLEY, Circuit Judge:

Waiving a jury, William Evans and Josephine Evans went to trial on a four-count indictment charging violations of the narcotics laws. William, convicted under all four counts, was sentenced to imprisonment for terms aggregating fifty years, and was fined a total of $11,000. Josephine, convicted under counts 1, 2, and 4, was sentenced to imprisonment for five years on each such count, the terms to run concurrently. Both defendants appeal.

Count 1 charged both defendants with unlawful concealment and transportation of two ounces of heroin at San Francisco, on March 4, 1957. Count 2

charged each of them with the unlawful sale of this heroin on the same date. Count 3 charged each of them with unlawfully concealing and facilitating the concealment and transportation of twenty-two grains of marihuana on the same date. The final count charged each of them with conspiring together with the object of unlawfully selling, dispensing, and distributing heroin, and of unlawfully concealing and facilitating the concealment of such heroin.[1]

Concerning the counts relating to heroin—counts 1, 2, and 4—appellants' principal contention relates to the sufficiency of the evidence. Josephine concedes that the evidence is sufficient to sustain her conviction under the substantive heroin counts—counts 1 and 2. She urges, however, that the evidence is insufficient to support her conviction under the conspiracy heroin count—count 4. William argues that the evidence is insufficient to support his conviction under any of the heroin counts.

There is no evidence that William ever had physical possession of the heroin in question. Even so, his conviction under the substantive counts may stand if the evidence sustains the verdict against him on the conspiracy count. Accordingly, we proceed at once

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[1] In the indictment, it is charged that, pursuant to this conspiracy, four overt acts were committed, as follows: (1) On March 1, 1957, Josephine received the sum of $700 from Sine Gilmore on the premises located at 1567 Ellis Street, San Francisco; (2) on the same date, William had a conversation with Gilmore in the [illegible] 1540 Ellis Street; (3) on March 2, 1957, William had a conversation with Gilmore in a 1949 two-door Buick sedan on [illegible] Gilmore and Broderick Streets; and (4) on March 4, 1957, [illegible] had a conversation with [illegible] on Pierce Street between [illegible] and Page Streets, in San Francisco

to a determination of the adequacy of the evidence to support the conviction of both appellants under count 4.

For the most part, the evidence is not in dispute, but where any conflict is found to exist, we accept that version which tends to support the judgments.

Appellants have lived together, "off and on," since 1950 or 1951, although the record does not show whether they were ever married. In the late winter of 1957, they operated an eating place, known as Oliver's Restaurant, at 1569 Ellis Street, in San Francisco. William lived above the restaurant, but spent some of his nights at 953 Broderick street, San Francisco.[2] Josephine lived at 181 Thrift street, San Francisco.

The first episode of the sequence of events here in question occurred early on the morning of February 27, 1957. At about 1:30 a.m. that day, while William was at the restaurant, he received a telephone call from one Sine Gilmore.[3]

Gilmore was a user of narcotics, and had twice been convicted of violating the narcotics laws of California. He had met appellants for the first time, but not together, about six weeks or two months previous to this telephone call. Within a few days prior to that call, Gilmore had received narcotics from one or

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[2]Further reference will be made to this address in discussing the marihuana count.

[3]With indicated exceptions, the facts hereinafter set out accord with the resume of the evidence contained in the Government brief.

the other of the appellants.[4] This had occurred on two or three occasions, after Gilmore had given money to Josephine for such purchases. Gilmore had also conversed with William prior to making these purchases, but denied that these conversations occurred when he was buying narcotics from Josephine.

Gilmore made the telephone call of February 27, 1957, from the office of the Federal Bureau of Narcotics. In so doing, and in the transactions of the succeeding few days, he was acting as an informer for, and special employee of, the Bureau. His telephone call on February 27 was monitored by an agent who listened in on an extension.

According to the testimony of this agent, Gilmore told William on this occasion, "My man from Stockton is in town again, and he wants another one just like it. I have the money with me now. Can I come to see you?" William replied that he was busy, and that Gilmore would have to see "the boss" tomorrow.

Gilmore's version of the conversation was "something about somebody coming from Stockton; that wanted something, some stuff, and I think he told me I would have to see the boss." Gilmore understood

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[4]This statement in the Government brief is apparently based on Gilmore's answer, "I suppose so," when asked if he had ever received narcotics "from either Josephine Evans or William Evans." He later denied that he had received narcotics from William at any time. It was his further testimony that he "might have on occasion" discussed narcotics with William, but "not along in that time."

"stuff" to mean narcotics, and the "boss" to refer to Josephine.[5]

The second episode occurred at approximately 1:00 p.m., on February 27, 1957. At that time, Gilmore met William at Oliver's Restaurant and had a conversation with him. No money or narcotics passed between them at this time.[6]

The third episode occurred on the afternoon of March 1, 1957. Gilmore was supplied with $350 in government funds, and, upon being searched, was found to have $350 of his own money, making a total of $700. He was also equipped with a Schmidt transmitting device. Under surveillance of federal narcotics agents, he proceeded to Oliver's Restaurant, where he remained from 3:30 to 4:30 p.m.

During this period, he was out of the sight of narcotics agents during an interval of only three or four minutes, when he went to the rear of the restaurant. He later reappeared with Josephine, after which he

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[5] Gilmore's actual testimony concerning what was meant by "the boss" is as follows:

"Q. . . . When he said, 'You will have to see the boss,' who is the boss he was referring to, if you know? A. Well, I guess he was talking about her. Q. Who is 'her'? . . A. I guess he was talking about Josephine."

[6] It may be useful to amplify this description of the episode which occurred on the afternoon of February 27, 1957, as set out in the Government brief. Before Gilmore met William on this occasion, federal agents searched Gilmore, searched his vehicle, and supplied him with $350. They also followed him to the restaurant, where Gilmore entered and stayed nearly an hour. A federal agent entered the restaurant before Gilmore did and remained until after Gilmore left. The agent saw Evans and Gilmore having a five to ten-minute conversation at the end of the counter as Evans was having coffee. The $350 was later returned by Gilmore to the agent.

had a conversation with her. Upon rejoining the narcotics agents, he was searched and the $700 was missing. Gilmore testified that he gave this money to Josephine for narcotics he had previously received on consignment.[7]

The fourth episode occurred in the early evening of the same day. About 7:00 p.m., Gilmore was again equipped with a Schmidt transmitting device. Again he drove to the vicinity of Oliver's Restaurant, under the surveillance of narcotics agents. A panel truck containing the receiving device for the Schmidt transmitter and a narcotics agent had been parked directly across the street from the restaurant since 2:00 p.m.

Shortly after Gilmore parked his car near the cafe, William entered the car, and the two drove to the Chicago Pool Hall. During this drive, William remarked that he was "leery" of the panel truck; that it had been parked there all afternoon.

The fifth episode occurred about midnight on March 1, 1957. At that time, Gilmore returned to the restaurant, went inside for a moment, and then returned to his car with William. As the car was leaving, William was heard to say: "You don't see what's going on around you very well." He added: "There has been heat all around the place tonight. There was heat in the restaurant and in the Booker T. Washington, and we are going to have to let things cool for a few days, and you will have to get in touch with me later."

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[7] There is no contrary evidence in the record concerning disposition of this money.

Gilmore said, "I don't have any money or anything else. What am I going to do?" William replied, "Don't worry about it. I will take care of you."[8]

The fifth episode, described above, is the last involving heroin in which William played a part. A final episode, involving Josephine, occurred on March 4, 1957. At 11:00 a.m., on that day, Gilmore met Josephine by prearrangement at a vacant lot in the vicinity of Page and Pierce streets, San Francisco. Josephine pointed to a board in the lot, and Gilmore, following her pointed directions, found a package wrapped in newspaper. This package was found to contain two ounces of heroin.

Gilmore testified that he had given Josephine one hundred and some odd dollars of his own money at the restaurant that morning, in part payment for this heroin. He denied giving any money to William for this heroin, or having any conversation with him concerning the money paid over. Gilmore also denied discussing narcotics with William the night before the payment was made, or of receiving any narcotics from him at any prior time. Gilmore stated that he "might have" on occasion discussed narcotics with William, but that "he never have told me he would give me them to sell." Gilmore stated that every time he

[8]We briefly amplify this description of the midnight meeting on March 1, 1957, as stated in the Government brief. Gilmore testified that, following the conversation quoted above, he drove William "home" (apparently the Broderick street residence). On the way they had a conversation about playing pool. According to Gilmore, William said "He would help me out."

spoke to William about narcotics, the latter "would refer more or less to the boss."[9]

As before noted, this summary of the evidence is drawn largely from the Government brief. It is evidence which is entirely undisputed, and consists, almost entirely, of the testimony of Government agents. The only non-Government testimony given credence in the above account is that of William (included because it is favorable to the Government), that he was the recipient of the telephone call of February 27, 1957.

Appellants argue that this evidence is not sufficient to support the judgments of conviction on the conspiracy count. Contending otherwise, the Government states that the clear inference to be drawn from this evidence is that William negotiated with prospective customers for the sale and delivery of narcotics, and arranged with "his co-conspirator," Josephine to make the actual deliveries.

The conspiracy here charged relates to the concealing, selling, dispensing, and distribution of "quanti-

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[9] Gilmore also testified as follows:

". . . Q. Well, he told you that he wouldn't have any dealings in narcotics, isn't that correct? (Testimony of Sine Gilmore.) A. I don't remember what exactly was said over the phone on that, but if he would say anything, I never could get him to talk about anything that would amount to anything. Q. Well, didn't he tell you that he didn't want to make any deal because it was too hot or you might go to jail? A. Well, he told me—no, not like that. He told me, he said, 'I got to think about my kids,' and that he didn't want to do a deal with it because he didn't want to be away from his kids, and that he had been away from them all the time. Q. All right. Then he told you that no deal in the world was worth going to the penitentiary for, isn't that right, or words to that effect? A. Words to that effect."

ties of narcotic drugs." It was therefore not necessary for the Government to prove that the asserted arrangements between "co-conspirators" involved the two crimes mentioned in counts 1 and 2. However, it was not error that the conspiracy provided the pertinent factor to relate an overt to counts 1 and 2, proof that Mrs. Moore engaged in the conspiracy would strengthen the inference that she [illegible] substantive counts. We do not [illegible] whether any [illegible] complied with [illegible] on March 1, 1957.

[illegible]

1957. Such evidence is not only lacking, but is specifically disavowed by the Government's witness, Gilmore.

There is, of course, evidence of an intimate personal relationship between William and Josephine, who handled the heroin in question. But guilt may not be inferred from mere association. Ong Way Jong v. United States (9 Cir.), 245 F.2d 392, 394.

There is also in the record evidence of William's past narcotics convictions. This evidence was first produced by appellants when William took the witness stand, for the apparent purpose of anticipating the Government's use of such evidence for impeachment purposes. On cross-examination, the Government brought out further references to William's past record. There is no indication that this was done to show scheme, plan, or design, or for any other purpose except impeachment. We have, in our review of the evidence, disregarded all of William's testimony except that which is favorable to the Government.

It is no doubt true that the evidence as to William's association with Josephine, and as to his own past record of convictions, gives rise to a suspicion that he conspired with Josephine regarding the transaction of March 4, 1957. But a suspicion, however strong, is not proof, and will not serve in lieu of proof. Ong Way Jong v. United States, supra, 394.

We therefore hold that the evidence does not support a finding that William or Josephine was involved

in any conspiracy involving the two ounces of heroin referred to in counts 1 and 2. Since the conviction of William on those substantive counts is dependent upon a finding that he and Josephine were engaged in a conspiracy involving that transaction, it follows that his conviction on counts 1 and 2 must be set aside.

For most of the same reasons, we are led to hold that the evidence does not support a finding that William and Josephine were engaged in a conspiracy with regard to the concealment, sale, dispensing, or distribution of any other narcotics.

The reported conversations between Gilmore and William indicate that there was some talk between the two of them concerning narcotics. But the gist of the conversation was that William declined to become involved in a narcotics conspiracy or transaction. It is true that his apparent reason for remaining aloof was his fear of being caught. It is, however, immaterial that William's refusal to engage in unlawful conduct was actuated by such a motive. In the eyes of the law, a man is innocent if he did not commit the unlawful act, whatever the explanation may be for his good behavior.

The four alleged overt acts were proved, as appellants concede. This is, without significance, however, unless these overt acts tend to prove the existence or furtherance of a conspiracy. For the reasons set forth at length above, we believe that the established overt acts serve neither of these functions.

It is our conclusion that the evidence fails to provide a basis for a finding that William and Josephine engaged in a conspiracy with regard to any narcotics. Their convictions on count 4 must therefore be set aside.

William alone was convicted on count 3, relating to the concealment and transportation of twenty-two grains of marihuana. As in the case of the other counts, William contends on appeal that the evidence is not sufficient to support his conviction on count 3.

The evidence pertaining to this count, as set out in the following two paragraphs, follows, almost verbatim, the summary of the testimony contained in the Government brief.

On March 5, 1957, at about 4:10 to 4:20 a.m., William was arrested at 953 Broderick street. This was done pursuant to a warrant of arrest issued by the United States Commissioner for violation of the narcotics laws. A search of the premises was made incident to the arrest. This resulted in the finding of twenty-two grains of marihuana concealed under the carpet on the top step of the stairs inside the dwelling. The marihuana was contained in a coin wrapper or envelope of the same type used to contain the heroin. William had reached the apartment only five minutes prior to his arrest, and when the officers arrived, was attired only in his underwear.

The apartment was also occupied by a woman who then identified herself as Mildred Evans. At that time, she stated that she was married to William, that

they lived together, and had their children living there. At the trial, however, she testified that her real name was Mildred Moore. It was her testimony then that she had never used the name Mildred Evans, but that an automobile was purchased in that name. She testified that William did not live with her and the children, one of whom was his, but that he visited her once or twice a week. William testified that he had spent only three or four nights at 953 Broderick street since January 10, 1957.

The record reveals some additional information not referred to in the Government brief. Mildred paid the rent on the Broderick street premises, and was the named customer for gas and electric service. Both William and Mildred testified that he maintained no clothing, toilet articles, or other personal belongings at that address. This was not denied by the federal agents who thoroughly searched the premises.

Mildred denied ownership of the marihuana. When questioned about the marihuana, William asked if the answer would make any difference in obtaining a conviction. Upon being told that it might, he said, "Well, I will try to figure out what you have against me first before I answer that." Later, when told that Mildred was to be booked for joint possession of the marihuana, he said, "Well, you don't want to book her for that." At the trial, William testified that he did not know the marihuana was there—had not put it there—had never seen it before.

William argues that the above-summarized evidence does not support his conviction under count 3, because

it provides no proof that he had the twenty-two grains of marihuana in his possession.

Count 3 is based upon 26 U.S.C.A., § 4744(a), making it unlawful to acquire or otherwise obtain any marihuana without having paid the transfer tax imposed by 26 U.S.C.A., § 4741(a), or to transport, or conceal, or facilitate the transportation or concealment of any marihuana so acquired or obtained. Section 4744(a) further provides that proof that any person shall have had in his possession any marihuana and shall have failed, after reasonable notice and demand, to produce the specified order form, "shall be presumptive evidence of guilt under this subsection. . . ."

In presenting its case, the Government relied upon this presumption. It was therefore required to prove that William had the twenty-two grains of marihuana in his possession. He had the narcotics in his possession if he knew of its presence and had control of it.[10] Knowledge and control, and hence possession, may be proved circumstantially. United States v. Pinna (7 Cir.), 229 F.2d 216, 218.

Proof that one had exclusive control and dominion over property on or in which contraband narcotics are found, is a potent circumstance tending to prove knowledge of the presence of such narcotics, and control thereof. People v. Antista, supra.

Where one has exclusive possession of a home or apartment in which narcotics are found, it may be in-

[10] Guevara v. United States (5 Cir.), 242 F.2d 745, 746; People v. Antista, 129 Cal.App.2d 47, 276 P. 2d 177.

ferred, even in the absence of other incriminating evidence, that such person knew of the presence of the narcotics and had control of them.

The evidence in this record warrants the inference that William lived at 953 Broderick Street part of the time, or was a frequent overnight visitor thereat. He was also present on the occasion when the narcotics were seized, and had arrived there sufficiently in advance of the arresting officers to enable him to hide the narcotics in the place where they were found. But, since he was not in exclusive possession of the premises, it may not be inferred that he knew of the presence of the narcotics and had control of them, unless there are other incriminating statements or circumstances tending to buttress such an inference. See People v. Antista, supra.

In our view, there are such additional incriminating statements and circumstances in this case. The evidence warrants a finding that Mildred was the only other adult who was present when the officers entered, and the only other adult who had access to the interior of the residence. She denied knowledge of the presence of the narcotics or ownership of them. William, when questioned after arrest, did not remain silent as he had the right to do,[11] but made a statement (quoted above) tending to substantiate Mildred's disclaimer.

The factfinder was entitled to accept her disclaimer, the result of which is to leave William as the only

[11] See Ong Way Jong v. United States, 9 Cir., 245 F.2d 392; Sandez v. United States, 9 Cir., 239 F.2d 239; 1957 Ann. Survey Am. L., N.Y. Univ. Law Rev., March 1958, vol. 33, No. 3, page 338.

other person who could have placed the narcotics where they were found. He denied knowledge of the presence of the narcotics, or ownership of them. The factfinder, however, was not required to believe him, especially in view of his previous narcotics convictions.

In view of these circumstances, and in the light of all the testimony summarized above, we are of the opinion that the evidence is adequate to support the conviction of William on count 3 of the indictment. Conviction on this count is not here challenged on any other ground.

Reversed as to William Evans on counts 1, 2, and 4, and as to Josephine Evans on count 4. In all other respects, the judgment is affirmed.

(The death of Circuit Judge Lemmon occurred on April 26, 1958. Although he heard the oral arguments, he did not participate in the foregoing decision.)

(Endorsed:) Opinion. Filed May 28, 1958.

Paul P. O'Brien, Clerk.

Appendix B

United States Court of Appeals for the Ninth Circuit

WILLIAM EVANS and JOSEPHINE EVANS, *Appellants*, vs. UNITED STATES OF AMERICA, *Appellee*.	No. 15,602

JUDGMENT

Appeal from the United States District Court for the Northern District of California, Southern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is reversed, as to William Evans on counts 1, 2 and 4, and as to Josephine Evans on count 4. In all other respects the Judgment be, and hereby is affirmed.

(Endorsed) Judgment.

Filed and entered, May 28, 1958.
Paul P. O'Brien, Clerk.

Appendix C

Title 28 U.S.C., sec. 1254(1):

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment of decree. * * *".

Title 18 U.S.C., sec. 3231:

"The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States."

The Fifth Amendment to the Constitution of the United States (insofar as here applicable):

"No person shall be deprived of life, liberty, or property, without due process of law; * * *".

The Sixth Amendment to the Constitution of the United States (insofar as here applicable):

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, * * *"

Title 26 U.S.C., sec. 4741(a) (insofar as here applicable):

"(a) *Rate.* There shall be imposed upon all transfers of marihuana which are required by section 4742 to be carried out in pursuance of written order forms

taxes at the following rates: * * * [setting forth such rates]"

Title 26 U.S.C., sec. 4744(a).

"*Persons in general.*

"(a) *Persons in general.* It shall be unlawful for any person who is a transferee required to pay the transfer tax imposed by section 4741(2) to acquire or otherwise obtain any marihuana without having paid such tax; and proof that any person shall have had in his possession any marihuana and shall have failed, after reasonable notice and demand by the Secretary or his delegate, to produce the order form required by section 4742 to be retained by him shall be presumptive evidence of guilt under this section and of liability for the tax imposed by section 4741(a)."

Title 26 U.S.C., sec. 7237 (Insofar as here applicable):

"Violation of laws relating to narcotic drugs and to marihuana.

(a) *Violation of law relating to opium leaves and coca leaves and marihuana.* Whoever commits an offense or conspires to commit an offense described in part I or part II of subchapter A of chapter 39 for which no specific penalty is otherwise provided, shall be fined not more than $2,000 and imprisoned not less than 2 or more than 5 years. For a second offense, the offender shall be fined not more than $2,000 and imprisoned not less than 5 or more than 10 years. For a third or subsequent offense, the offender shall be fined

not more than $2,000 and imprisoned not less than 10 or more than 20 years. Upon conviction for a second or subsequent offense, the imposition or execution of sentence shall not be suspended and probation shall not be granted. For the purpose of this subsection, an offender shall be considered a second or subsequent offender, as the case may be, if he previously has been convicted of any offense the penalty for which is provided in this subsection or in section 2(c) of the Narcotics Drugs Import and Export Act, as amended (21 U.S.C. 174), or if he previously has been convicted of any offense the penalty for which was provided in section 9, chapter 1, of the act of December 17, 1914 (38 Stat. 789), as amended; section 1, chapter 202, of the act of May 26, 1922 (42 Stat. 596), as amended; section 12, chapter 553, of the act of August 2, 1937 (50 Stat. 556), as amended; or sections 2557(b)(1) or 2596 of the Internal Revenue Code enacted February 10, 1939 (ch. 2, 53 Stat. 274, 282), as amended. After conviction, but prior to pronouncement of sentence, the court shall be advised by the United States attorney whether the conviction is the offender's first or a subsequent offense. If it is not a first offense, the United States attorney shall file an information setting forth the prior convictions. The offender shall have the opportunity in open court to affirm or deny that he is identical with the person previously convicted. If he denies the identity, sentence shall be postponed for such time as to permit a trial before a jury on the sole issue of the offender's identity with the person previously convicted. If the

offender is found by the jury to be the person previously convicted, or if he acknowledges that he is such person, he shall be sentenced as prescribed in this subsection.

(b) *Unlawful disclosure of information on returns or order forms* * * *"